

*Excerpts from Justice Harry A. Blackmun's Comments  
at the 1992 Judicial Conference*

Now these comments from here on in are personal. They are somewhat intimate. . . . I make no particular apology for doing this because I feel I am generally among friends here and as a person and as a citizen, I have a right to my impressions though some might say I have no right to speak out on them. But here it goes anyway.

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[T]here are the inevitable questions which the media ask, which I am sure you ask. Is the Court moving further to the right and hardening in its conservatism so far as civil rights and human rights are concerned? Is the Court cutting back on federal protection of civil rights and throwing that area to the extent it [exists] to the state courts and the legislatures? And please don't take offense, was ideology becoming a factor rearing its head and intruding into the decisional process to a greater extent than before? . . . To what extent was the presence of an election year a factor? . . . [W]e survived, but I think maybe it is a factor. Does the public's hunger for knowledge about the Court enhance the urgency of the situation? . . . . People are hungry for knowledge as to how the Court works, and it comes through very clearly that this is the least known of the three branches of government and yet . . . , it is the most open. Is the confirmation process as presently followed through the Clarence Thomas hearing something in need of restructuring? . . . .

I, for one, for one as a citizen have a hope and a wish that the election process this year will be less dirty and less full of innuendos. [A] wish, I suppose I must concede, as a forlorn one if history is to be any guide. Presidential candidates of the past have been subjected to ridicule and falsehoods and plain old-fashioned unfairness. [O]ne need only look at the Lincoln election years of 1860 and 1864 to realize this, and yet I think I have a right as a citizen to my hope and my wish for something better. Politics do not need to be that way. . . . I take comfort in the fact that the American people usually can see through such tactics and judge them for what they are. This country deserves the best it seems, but often has to make do with something less than the best.

I have not joined Brennan and Marshall on the Eighth Amendment. They feel the death penalty is a violation of the Eighth Amendment. I have taken the position that if the state wants it, it is entitled to have it, provided it is properly and fairly administered . . . . I know from the Minnesota experience that there is no deterrent factor in capital punishment whatsoever, and so it gets down to retribution. . . . I have concluded that every time we execute somebody, we are all lessened in stature.

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I think we still write too much. . . . And why do we engage in all this writing? It is much easier to write . . . at length than it is not to write and to write briefly.

The move to the right is, I think, somewhat evident with a hardening of attitude toward criminal and inmate claims.

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I think we will see more of the same. The so-called conservative Justices clearly are in control if they want to exercise it, and I put in that category the Chief Justice, Byron White, Nino Scalia, David Souter, and Clarence Thomas, and plus Tony Kennedy on occasion. [O]f course I always say for Byron White you get into a race case and the Kennedy influence will prompt him perhaps to go the other way.

I think the conservatives are aware of this and that they could take hold whenever they wish, but so far they haven't done so as a matter of routine. It will be this way until the middle of the twenty-first century anyway, and you might bear in mind that only one Justice on that Court has been appointed by a Democratic president. One. And that is Byron White. All the rest by Republican presidents. And perhaps this is in mind with the mood of the country. You would know that better than I do. I am not saying it is bad. It is the nature of the system. The pendulum eventually does swing.

On the 9th day of June 1970, I walked after taking my oath into the conference room and there were the eight assembled: Hugo Black, William O. Douglas, John Marshall Harland, William J. Brennan, and I said to myself, what am I doing here? And I still wonder. And a lot of people in this country, including a lot here, probably wonder what I am doing there, too. But the years have been interesting. They haven't been much fun, but it is a fascinating experience to exercise that privilege. It is the hardest job I have ever had. I thought I worked hard in practice, and I thought I worked hard at Mayo, and I thought I worked hard on the Court of Appeals, but this is tough. It is competitive, it is lonely, and I am amused by the transformation the media makes of the Minnesota Twin so-called to a flaming liberal on the left. John Paul Stevens and I have a lot of fun with that one, being appointed by Republican presidents, but it has been a great privilege and thanks are due from me for that opportunity to the appointing president, to my colleagues, and to you, and past members of the Eighth Circuit who prepared me as best one like me could be prepared.

Dottie and I for over twenty years now have lived in a secondary, I will put it that way, apartment on the Virginia side of the Potomac River. . . . [W]e stayed there because for me it has two advantages. The first is the proximity to the court. . . . But the second advantage is the outlook, particularly at night. From our small balcony we look directly to the east across the river. Theodore Roosevelt Island lies between us and the Kennedy Center and the Watergate Complex, and off to the left is Georgetown and the University. There on the hill sits the National Cathedral, and directly ahead in the far distance is a national shrine of the immaculate conception. And slightly to the right is the Washington Monument lit up at night so that the markings where construction stopped during the war between the states are clearly visible. And farther to the right is the Lincoln Memorial and still farther is the Jefferson and the tide basin and the cherry trees. I like that view. I depend upon it. It is always there, day and night, friendly and warm in good weather and in bad. There is a certain comfort about it.

Do you share with me a concern about our standards, professional and otherwise these days? . . . Are you bothered at all by the current emphasis in the legal profession upon the bottom line, on billable hours, on paying bright, young law clerks a bonus to sign up with a firm just as a bonus is paid to a ball player after a .237 batting average year when he signs his next contract? And upon the evident reluctance in many quarters to engage in pro bono work . . . . [A]re you concerned about the interest in some quarters of the medical profession with talk about that profession's lapses in patient confidence and about the proliferation of malpractice suits? And are you concerned about the wretched events that took place in Los Angeles beginning April 29? Now weeks later we cannot escape the grip and the significance of those events and what they hold for all of us in the months and years ahead. Indeed, it seems as though the entire world, the Far East, the Middle East, Africa, South America, and Europe, and here, is in turmoil. Man's inherent inhumanity to man. Can we possibly rise above it and see to it that the flowering of new life somehow will rise as it always has before from the ashes of old disasters. Are you concerned with the blight of continued racism and anti-Semitism in this country? Nothing has convinced me that racism is not all about us still, and at times seems to be growing stronger and more ugly. We sense it in this election year as it creeps into the open. Are you concerned about continued sex discrimination in our society? Sexual harassment has been with us a long, long time. Will we ever get rid of it? Do we really want to?

Are you concerned with what seems, to me at least, to be the lessening influence of your Supreme Court as the bastion for the protection of human rights and of civil rights, and for sensitive interpretation of constitutional provisions, especially those of the first ten amendments? . . . [T]he line between the fright of despotism and freedom is a narrow one and very fragile. And this takes me once again to the words of Edmond Conn; I have quoted

them on occasions before, let me quote them here. Almost thirty years ago in 1963, Professor Conn at New York University edited a book called *The Great Rights*, and the closing lines of that book state what for all of us ought to be the obvious. "Freedom is not free. Shaping and preserving a new kind of society necessarily involves personal commitment, costly risk and constant effort. The cultivation of civil liberty can be no more passive than the cultivation of a farm. A man can inherit the land on which he lives. He can even inherit the first crop of produce after he takes over. But then if he stops everything stops and begins to crumble." . . . [H]e goes on to say that, "for freedom we must exercise constant care and constant attention." And that, I think and submit, is the formula. That is the charge upon us as federal judges, as citizens, as Americans. Constant care for this little instrument and what it means. Constant attention to it. We had better be up to it and the question, of course, is whether we are.